Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 191.

JETTY SIMON, PLAINTIFF IN ERROR,

vs.

JOHN N. CRAFT.

Supplemental Brief for the Plaintiff in Error.

Since filing the brief for the plaintiff in error, a few authorities not therein cited have come to our attention, and we have examined those authorities which are cited by the defendant in error to uphold the proposition that at common law no notice to the alleged lunatic was necessary in the proceedings in which his insanity was to be adjudged and his property to be taken from him and passed over to a guardian. We have also examined the American authorities cited by the defendant in error to uphold the assertion that no notice is necessary in an inquisition of lunacy as it exists in several of the States. We desire, therefore, to cite the additional authorities referred to and

to submit a brief abstract of the authorities cited by the defendant in error.

The defendant in error contends that a judgment of the court cannot be collaterally attacked, even for a want of service upon the defendant or for jurisdiction of the court over the subject-matter. Upon this question we desire to add to the authorities upon brief the case of Kilbourne *versus* Thompson, 103 U. S., 197, and also the case of The State Bank of Ohio *versus* Knoop, 16 Howard, 391, where it is held that this court will never be bound by the decision it is reviewing, or, as is said in The Louisville and Nashville Railroad Co. *versus* Palmer, 109 U. S., 256, by any other State decision which does not announce a well-settled construction by the State courts. These authorities are material, in view of the fact that the present decision of the supreme court of Alabama is a departure from all former decisions upon the same subject, as we have attempted to show in our brief.

On page 34*b* of our brief we have said that the doctrine that the finding of a court upon *quasi* jurisdictional questions could not be overturned upon a collateral attack, even if established, seemed to us to have no application to the question of personal service, for the apparent reason that the defendant has no opportunity of being heard upon this question where he is not served, as he has in regard to other jurisdictional questions which are litigated after he is before the court. Upon this question we desire to cite the case of Noble *versus* Union River Logging Co., 147 U. S., 173.

As was anticipated in preparing our original brief on this subject, the defendant in error, omitting all mention of the

statute of Edward the 6th, which is cited upon our brief, and which established the absolute right of the alleged lunatic to notice and opportunity to be heard, has cited a line of English authorities prior to this statute holding that there need be no notice to the alleged lunatic of the issuance of the inquisition. These authorities, however, themselves explain that this is not because the alleged lunatic has no right to be heard, but only because the issuance of the inquisition is only in the nature of the issuance and service of the summons, affording the alleged lunatic an absolute right to be heard by means of what was called the traverse. To illustrate, the defendant in error on page 11 of this brief quotes from the case of *Ex parte* Ward, 6 Ves., 579, the following fractional sentence:

"The law has provided that no person shall be put in such a position, deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding that I must admit to be *ex parte*."

By turning to the authority just above cited from, however, it will be found that the period with which the quotation is ended, is that of the brief-maker; that in the authority itself it is a colon, the sentence in fact continuing as follows:

"a proceedings which the law supposes may collect mistake: and therefore has given a positive right to certain persons to traverse the inquisition." Citing St. 2d Edward VI, c. 8, s. 6, which will be found copied in our brief, p. 29.

We have therefore determined to submit the following abstract of the defendant's authorities:

Shelford on Lunatics, Idiots, &c., second edition, page 157, section 6, chapter 6:

"Where the jury under the commission has determined that the object of it is of unsound mind, the consequence is that the person who has authority to issue the commission is bound to make a grant of the custody of the person and estate; yet it is clear that a person found by the inquisition to be of unsound mind has an absolute right to require the further proceeding of a traverse. No grant, therefore, of the custody could formerly be made, pending the traverse; and the court, if there was no fund in its hands, could not make an order as to the costs of the commission.

"When the determination of the party to traverse is known, the Lord Chancellor is bound to put the soundness of the verdict in that course of inquiry; in the interval, everything with regard to the dominion over the property or person was formerly stopped, and the consequence was that it was impossible to make any order about costs," &c.

In the appendix to Shelford on Lunatics I find the following statute:

2 & 3 Edw. 6, A. D. 1548, cap. VIII, sect. 6:

"If any person be or shall be untruly, founden lunatic, idiot or dead: Be it enacted by the authority aforesaid, that every person and persons grieved, or to be grieved, by any such office or inquisition, shall and may have his or their traverse to the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse, upon untrue inquisitions or office founden; any law, usage, or custom to the contrary in anywise notwithstanding."

On page 156 it is stated that the statutes of the 8 and 18 Henry 6 direct a month to elapse between the retnrn of the

inquisition and the grant of the custody of the estate, that the party may come in and tender a traverse; and it seems that if the grant is made before the expiration of the month it is void. In case a traverse be tendered, the grant of the custody will generally be suspended, at least until further orders; for, if upon the trial of the traverse the party be found *compos mentis*, the property cannot be taken; and therefore, where leave to traverse an inquisition has been granted, the court refused to confirm the master's report approving of the committees.

Shelford on Idiots, Lunatics, &c., second edition, page 121, section 4, chapter 4:

In describing the proceedings had when the master in lunacy and jury have assembled to execute the commission, it is said:

"The lunatic ought also to be examined by the master in lunacy and a jury, all other parties being absent; the alleged lunatic has also a right to insist on such examination and to be present at the execution of the commission."

On page 125, same chapter, &c., it is stated:

"The master in lunacy, or commissioners and jury have a right to inspect and examine the lunatic, and it is believed most commonly do so."

On page 127, same chapter, &c., it is said:

"A commission may be directed against a *non compos* abroad, and the inquisition shall be taken, not where he last resided, but where his mansion-house or other property is situated."

The reason given on page 128 is that—

"If no inquiry can be made in this country, both the

person and the estate would be in a very unfortunate case, and also the King as to his prerogative."

"If he be beyond the sea and is of sound mind himself, the laying hold of his lands is notice to him that such proceedings are against him, and he may come and appear," &c.

On page 130, of same chapter, &c., it is again stated:

"The supposed lunatic himself has a right to be present at the execution of the commission."

But on page 131, same chapter, &c., it is said:

"In ordinary cases of the execution of inquests of office, inasmuch as such proceedings are *ex parte* and not conclusive, notice is not given of the execution of the commission to the party who will be affected by it; but if sufficient reason for such notice is made out on application to the court, an order may be obtained that reasonable notice be given to the party requiring it."

I.

In re Cook, 6 N. Y. Sup., 720, br. 10, did not involve or decide a question as to notice to the lunatic, but involved only the necessity of notice to a grandson and others having a secondary interest in the estate.

II.

Willis *vs.* Willis, 12 Pa. St., 161, is not in point. There the holding was not that notice was unnecessary, but that in the absence of proof and where the record was silent it would be presumed that notice had been given. The question as to whether notice was necessary to the validity of the statute under the XIV amendment was not hinted at.

III.

In re Wendell, 1 Johnson Chancery, 600, the court not only did not deny the necessity for notice, but expressly directed the trial by jury upon issue to be formed between the alleged lunatic and the petitioner. The defendant in that case was actually in court and represented by counsel.

IV.

In re John M. B. Child, 16 N. J. Equity, 498, the question of the necessity for notice and opportunity to be present was neither raised nor discussed. The court asserted—and even this without reasoning or the citation of authority—that it was not absolutely necessary that the alleged lunatic should actually be before the jury. But there is a great difference between saying that an appearance by a defendant is not necessary to the validity of the judgment, and saying that an opportunity to appear need not be accorded him.

V.

In re Daniel Perkins, 2 Johnson's Chancery, 124, does assert that a commission of lunacy may issue against a person abroad, but not that it may be tried and a judgment rendered which will deprive him of his life, liberty, and property without notice, or after denying him the opportunity to be heard.

This is most forcibly pointed out by case next commented upon.

VI.

Re Petit, 2 Paige, 174: This case, like that above mentioned, held only that proceeding would lie against a non-resident having property in the county. In this case, however, it was pertinently said: "The commissioners must give her due notice of the time and place of executing the commission, that she may attend if she thinks proper to do so."

VII.

So in the case of *In re* Ganse, 9 Paige, 416, it is held as in last two cases, but also that notice to alleged lunatic is necessary.

VIII.

Southern Tier Mas. & C. *vs.* Laudenbach, 5 N. Y. Sup., 901, does assert that notice is unnecessary, but the reason assigned for the holding entitles the opinion to no great weight. Here it is: "The next objection is that there was no notice to Laudenbach of the execution of the commission. Whether or not notice shall be required in proceedings *in rem* depends upon the statute. No question of constitutional power is involved. The Fifth Amendment to the Constitution of the United States has nothing to do with it. That amendment restricts the power of the General Government, but has no effect upon the States."

IX.

Smith *vs.* Barnham, 1 Aikens, 84, decides only that, in absence of proof to contrary, notice will be presumed from silence of record—not that it was unnecessary.

X.

Chavennes *vs.* Priestly, 80 Iowa, 316; S. C., 45 N. W., 768: This is the only case which we have seen where it is squarely held that notice is unnecessary, and that constitutional guaranty has no application to the case. It is asserted, not argued nor supported by authority. The reason given is that notice would not avail an insane man. It will be observed that this assumes the very point at issue.

XI.

Ex parte Hall, 7 Ves., Jr., 261: Upon what theory this case is cited I am lost to know. Notice was here directed, but the question as to whether it was of right was not discussed.

XII.

Ex parte Southcote, 2 Ves., Sr., 401: It is true that in this case it is held that a proceeding of lunacy may be had against a non-resident lunatic owning an estate. It is also true, however, that in this case the chancellor declared:

1st. That the issuance of commission determined not whether the party was a lunatic, but only whether that subject should be inquired into.

2d. That the proceedings against a non-resident would not be conclusive, for "the laying hold of his lands is notice to him that such proceedings are against him, and he may come and appear, or any person opposing the commission on his behalf will be heard."

XIII.

In re Deamer, 6 Wend., 497: Cited to show that an inquisition of lunacy is a proceeding *in rem*.

See our Brief, p. 21.

XIV.

Gregnon *vs.* Astor, 2 How., 319: This is cited as holding that a lunacy proceeding cannot be collaterally attacked. It does not mention such a proceeding. It holds only that an administrator's sale cannot be collaterally attacked, except on ground that there was no vacancy. (See Scott *vs.* McNeal.) It shows the distinction between jurisdictional and quasi-jurisdictional facts. (See Mobile and Union River Logging R. R., 147 U. S., 173.) It shows that an administrator represents estate, which is the owner of the property, and there is therefore *notice*, and it distinguishes between courts of general and courts of special jurisdiction.

XV.

Rogers *vs.* Walker, 6 Penn. St., 371: Ejectment by guardian. Defendant objected to inquisition as showing title, because no notice to lunatic. Court held that it was *prima facie* evidence against *third persons*, and that it bound the lunatic because she did appear and *traverse* and try the issue. Question here presented not discussed.

XVI.

King *vs.* Daly, 1 Ves., Sr., 269, explains all of the common-law cases holding that notice of the application for the inquisition was unnecessary, because an inquisition is only an indictment, and that lunatic has the right to traverse.

XVII.

Bennett *vs.* Hunter, 9 Wallace, 376, does not seem to us to be in point. The holding there was that failure to pay tax works a forfeiture to State which could be declared by legislature. The question of taxation has always been an exception, nor would this prevent the necessity for proof that taxes were not paid. It is not conclusive upon the party unless supported by the fact upon collateral attack.

XVIII.

King *vs.* Mullins, 171 U. S., 416 *et seq.*: Held only that nonpayment of taxes authorized absolute forfeiture without any proceedings whatever, so as to transfer by its own force the title. This is all right, but it is not the equivalent of holding that the declaration of such a forfeiture would preclude an inquiry into the question as to whether the facts working such forfeiture ever in fact occurred.

XIX.

Hutts *vs.* Hutts, 62 Ind. Reports, p. 214: The holding in this case was not that notice was unnecessary, but only that, as against strangers to the record, notice would be presumed

to have been given in the absence of any proof to the contrary and where the record was silent.

XX.

Studabaker *et al. vs.* Marphy, vol. 7, Ind. App., p. 368:

The question of the necessity of notice was not raised in this case. The alleged lunatic in fact appeared and contested the petition, and the lunatic appealed. The point was made that the proceedings were *ex parte*. Exactly what this could mean in a matter which was in fact litigated by both parties, we do not understand, but be this as it may, the court held that the lunatic had the right to appeal.

XXI.

Nailor's Children *vs.* Nailor and Wife *et al.*, 4 Dana's Reports, p. 339 (Ky.):

A short quotation from this opinion will do:

"A clear case should be made out, upon the inquisition, of *non compos mentis*, or the mental incapacity to manage his own concerns.

"And such a case is made out, with the guards which the law has thrown around the unfortunate individual, of a right to have the inquisition found by his peers, who will ever lean towards liberty of a citizen, and also, the right to traverse the inquisition before the chancellor, if found against him, there can be no danger in its exercise, but protection and security to the helpless."

XXII.

Dutcher *vs.* Hill, 29 Mo. Reports, p. 272:

In this case the court said:

"The statute is silent on the subject of notice to the lunatic; but directs that in proceedings under it, the county court may, in its discretion, cause the person alleged to be of unsound mind to be brought before the court. Whether this provision is a substitute for the notice and was designed to leave it to the discretion of the court whether the alleged lunatic should have notice and should be present at the making of the inquisition we will not determine, as on any construction of the statute we are of opinion it should appear from the proceeding why the notice was not given, or the attendance of the person of unsound mind required.

"On general principles persons should have notice of proceedings in courts by which their rights are to be effected, otherwise those proceedings will not bind them.

"Judgments rendered without notice are not binding."

XXIII.

Kimball *vs.* Fish, 39 N. H. Reports, 110: In this case the holding is simply to the effect that the failure to give notice to the alleged lunatic was a matter which could be waived by him, and that it was waived by him in this particular case by his filing a petition to have the other party appointed as his guardian.

XXIV.

Holman *vs.* Manning and Trs., 65 N. H. Reports, p. 228:

The question here presented was whether an amendment of complaint could be made, and the court held that the

parties being before the court that the question as to what pleadings could be had did not involve the question of due process of law.

"The opinion begins with the statement: 'Due process of law generally implies and includes regular allegations, opportunity to answer, and a trial according to some settled course of proceedings' (citing authorities)."

XXV.

Milley Medlock *et al. vs.* John Cogburn *et al.*, 1 Rich. Eq., p. 477 (S. C.):

This is a bill filed to enjoin John Cogburn from acting as committee of complainant, who was found to be of unsound mind by an inquisition taken under a writ in the nature of the writ *de lunatico inquirendo.*

The grounds for relief alleged by the bill are, first, that the complainant Milley Medlock had not notice of the application to the court and of inquisition of which she was found of unsound mind, and, secondly, that she is not in fact of unsound mind.

The opinion in substance holds as follows, viz: That where a person in interest is dissatisfied with the finding of the jury the course is to traverse at common law.

"The right to traverse is referred by the English cases to the statute 2d and 3d Edw. 6, c. 8, 56, providing if any person be or shall be untruly founded lunatic, etc., be it enacted that every person or persons grieved or to be grieved by any such office or inquisition, shall or may hear his or their traverse to the same, immediate, or after at his pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden."

It is then declared that this became part of the law of South Carolina.

"As to the first, I think from the authorities that notice was not necessary. In *Ex parte* Southcote it was held that the presence of the party was not necessary. In that case he was in a foreign country, and plainly it was not intended that the notice should be given him. This may be inferred from *Ex parte* Hall, 7 Ves., 261, in which, under the circumstances of the case, Lord Eldon directed that the party should have notice, and quashed the inquisition for want of it.

In the King *vs.* Daly, 1 Ves., Sr., 269, which was a case of inquisition of escheat, it was said, in all cases of *inquest*, not to be the general rule that notice should be given; yet when a party desires notice he is entitled to it.

It was his privilege to be present if he thought proper. So it is said the jury may require the presence of a party if they think proper, but they are not bound to do it." * * *

Having cited the case of *Ex parte* Hall, 7 Ves., 261, he says:

"As said by the chancellor in the last case, the traverse under the statute is matter of right at law and perhaps no order of this court would be necessary for this purpose."

Respectfully submitted.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Plaintiff in Error.